IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO. 794 OF 2005
ALONG WITH
CRIMINAL APPLICATON NO.795 OF 2005
ALONG WITH
CRIMINAL APPLICATION NO. 796 OF 2005
ALONG WITH
CRIMINAL APPLICATION NO.797 OF 2005

Mr. Rakeshchand Agarwal & Ors. ...Applicants.

V/s

State of Maharashtra & Ors. ...Respondents.

Mr. U. Sankar Samudrala for the applicants.
Mr. S.R. Shinde, APP for the State.

CORAM: V.M.KANADE,J.
DATE: 21st April, 2005

P.C.:

1. Heard the learned counsel for the applicants.

2. Since the issue involved in all these applications is identical, they are being disposed of by this common order.

3. Applicants are challenging the order of issuance of process passed by the Metropolitan Magistrate, 12th Court, Bandra in a complaint filed by respondent No.1 under section 138 of the Negotiable Instruments Act.

4. It is submitted that the applicants are non-functional and non-executive directors of

respondent No.3 - Company and were never responsible for day-to-day management of respondent No.3 - Company. It is submitted that respondent No. 3 - Company was declared as a sick Industrial Unit by B.I.F.R. in 1997. It is submitted that the cheques are issued after the Company was declared as a sick Industrial Unit. It is submitted that B.I.F.R. had sanctioned a Scheme on/or about 19/5/2004 and the liabilities of respondent No. 3 - Company were to be taken over by the new management. It is submitted that in the order passed by the B.I.F.R., it was specifically mentioned that the unsecured creditors who had filed cases under section 138 of the Negotiable Instruments Act were not required to be given preferential treatment under SICA. The learned Counsel appearing for the applicants has relied upon the judgment of the Supreme Court in the case of Kusum Ingots and Alloys Ltd. Vs. Pennar Peterson Securities Ltd. and Others reported in 2000 Company Cases 755 (SC) wherein the Supreme Court held that it would be unjust and unfair and against the intent and purpose of the statute to hold that the directors should be compelled to face trial in a criminal case wherein the cheques were dishonoured for the reasons which were beyond the control of the Directors.

5. It is not possible to accept the submissions made by the learned Counsel appearing for the applicants. The Supreme Court in the case of Kusum Ingots (supra) while considering whether the provisions of section 22A of the Sick Industrial Companies (Special Provisions) Act, 1985 affects a criminal case for an offence under section 138 of the Negotiable Instruments Act, has observed as under:-

> "The question that remains to be considered is whether section 22A of the Sick Industrial Companies (Special provisions) Act affects a criminal case for an offence under section 138 of the Negotiable Instruments Act. In the said section provision is made enabling the Board to make an order in writing to direct the sick industrial company not to dispose of, except with the consent of the Board, any of its assets - (a) during the period of preparation or consideration of the scheme under section 18 ; and (b) during the period beginning with the recording of opinion by the Board for winding up of the company under sub-section (1) of section 20 and up to commencement of the proceedings relating to the winding up before the concerned High

Court. This exercise of the power by the Board is conditioned by the prescription that the Board is of the opinion that such a direction is necessary in the interest of the sick industrial company or its creditors or shareholders or in the public interest. In a case in which the BIFR has submitted its report declaring a company as "sick" and has also issued a direction under section 22A restraining the company or its directors not to dispose of any of its assets except with consent of the Board then the contention raised on behalf of the appellants that a criminal case for the alleged offence under section 138 of the Negotiable Instruments Act cannot be instituted during the period in which the restraint order passed by the BIFR remains operative cannot be rejected outright. Whether the contention can be accepted or not will depend on the facts and circumstances of the case. Take for instance, before the date on which the cheque was drawn or before expiry of the statutory period of 15 days after notice, a restraint order of the BIFR under section 22A was passed against the company then it cannot be said that the offence under

> section 138 of the Negotiable Instruments Act was completed. In such a case it may reasonably be said that the dishonorning of the cheque by the bank and failure to make payment of the amount by the company and/or its directors is for reasons beyond the control of the accused. It may also be contended that the amount claimed by the complainant is not recoverable from the assets of the company in view of the ban order passed by the BIFR. In such circumstances it would be unjust and unfair and against the intent and purpose of the statute to hold that the directors should be compelled to face trial in criminal case."

However, the Supreme Court, after making the aforesaid observations has observed as under in the next paragraph:-

> "Except in the circumstances noted above we do not find any good reason for accepting the contentions raised by the learned counsel for the appellants in favour of the prayer for quashing the criminal proceedings or for keeping the proceedings in abeyance. It will

> be open to the appellants to place relevant materials in this regard before the learned magistrate before whom the cases are pending and the learned Magistrate will examine the matter keeping in mind the discussions made in this judgment."

Thus, from the aforesaid observations, it is clear that the order which was passed by the Supreme Court in the case of Kusum Ingots (supra) was in respect of section 22A of the Sick Industrial Companies (Special Provisions) Act, 1985 and the Supreme Court in the last paragraph had made it clear that under other circumstances, the Magistrate should consider the principles laid down in the judgement. Thus, the contention raised by the learned counsel appearing on behalf of the applicants will have to be rejected.

6. The Magistrate is directed to consider all questions raised in these applications and also keep in mind the discussions made by the Supreme Court in its judgment in the case of Kusum Ingots (supra) and decide the matter on merits and in accordance with law. With these observations, Criminal Applications are rejected.

V.M. KANADE, J.